Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and Subsidiaries, Debtors-in-possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, *et al*.	)	MB Docket No. 05-192

COMMENTS OF TIME WARNER CABLE INC.

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June 22, 2012

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COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("TWC") hereby submits the following comments in response to the Notice of Proposed Rulemaking issued in the above-captioned docket.[1]

INTRODUCTION AND SUMMARY

TWC strongly supports the Commission's proposal to sunset its *per se* prohibition on exclusive contracts between cable operators and their affiliated, satellite-delivered programmers. Since its enactment in 1992 as part of Congress's broader effort to regulate program access, the exclusivity ban has burdened the First Amendment rights of cable operators such as TWC and

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1 *Revision of the Commission's Program Access Rules; News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, MB Docket Nos. 12-68, 07-18, 05-192, Notice of Proposed Rulemaking, FCC 12-30 (rel. Mar. 20, 2012) ("NPRM").

their affiliated programmers. The D.C. Circuit has long recognized that the exclusivity ban directly implicates the speech rights of cable operators, explaining that "because the ability to enter into exclusive contracts could create economic incentives to invest in the development of new programming, prohibiting such contracts might result in reduced programming—that is, less speech."[2] Moreover, by forcing cable-affiliated programmers to reach agreement with and be carried by competing multichannel video programming distributors ("MVPDs")—even when the programmer would prefer not to be carried—the exclusivity ban infringes on the constitutionally protected right *not* to speak,[3] and runs headlong into the First Amendment's "presum[ption] that speakers, not the government, know best both what they want to say and how to say it."[4] And by targeting only cable operators and not other distributors in today's competitive marketplace, the exclusivity ban unreasonably discriminates based on the speaker's identity, and is just the sort of "restriction[] distinguishing among different speakers" that courts usually find constitutionally invalid.[5]

Thus, to extend the exclusivity ban, the Commission would have to demonstrate not only that the ban remains "necessary" under the sunset provision of Section 628(c)(5),[6] but also that the ban satisfies the heightened level of scrutiny applicable under the First Amendment. The

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2 *See Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 979 (D.C. Cir. 1996).

3 *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes the choice of what not to say.").

4 *Riley v. Nat'l Fed. of the Blind, Inc.*, 487 U.S. 781, 790-91 (1988).

5 *Citizens United v. Fed. Elec. Comm'n*, 130 S. Ct. 876, 898 (2010).

6 *See* 47 U.S.C. § 548(c)(5) (providing that, in order to extend the exclusivity ban, the Commission must find that the ban "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming").

Commission's extension of the ban in 2007 was affirmed by a divided panel of the D.C. Circuit,[7] and over a dissent by Judge Kavanaugh, who concluded that because "[c]able operators no longer possess bottleneck monopoly power in the video distribution market," the ban "is no longer necessary to further competition and no longer satisfies . . . intermediate scrutiny."[8] The majority opinion also recognized that burgeoning competition in the video distribution marketplace was eroding the Commission's traditional justifications for the exclusivity ban, and made clear the court's expectation that "if the market continue[d] to evolve at such a rapid pace, the Commission … soon [would] be able to conclude that the exclusivity prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming."[9]

The time for such a determination plainly has arrived. The historical concerns that prompted imposition of the exclusivity ban—horizontal concentration in the video distribution market and vertical integration between cable operators and programmers—no longer apply in light of the "dramatic changes in technology and the marketplace" that the Commission recently acknowledged in sunsetting its former "viewability" mandate.[10] In particular, cable operators now face more competition than ever from satellite, telco, and Internet-based video distributors. At the same time, vertical integration between cable operators and cable programmers has markedly diminished since 1992, while other forms of vertical integration that are not subject to Commission regulation—such as, for instance, the efforts of video programmers to distribute

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[7] *See Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010) ("*Cablevision I*").

[8] *Id.* at 1316 (Kavanaugh, J., dissenting).

[9] *Id.* at 1314.

[10] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Fifth Report and Order, FCC 12-59, ¶ 11 (rel. Jun. 12, 2012) ("*Viewability Sunset Order*").

content through their own Internet outlets—have become more prevalent. As a result, there is not a sufficient governmental interest to justify continued regulation of program access at all, much less to impose a categorical ban on exclusivity agreements between cable operators and their affiliated programming vendors.

The same constitutional concerns that prompted the Commission's unanimous decision to sunset the dual carriage requirements adopted pursuant to the statutory "viewability" provision warrant an identical outcome here. Although broadcasters asserted that an extension of those requirements was imperative, the Commission correctly concluded that the record "lack[ed] evidence that infringing on cable operators' discretion" was "necessary" to protect the asserted governmental interests (there, protecting the "viability of over-the-air broadcasting").[11] The Commission accordingly found that "the burden placed on cable operators" was not justified.[12] Here, by the same token, the acknowledged emergence of robust competition in the video distribution marketplace will preclude any showing that a categorical ban on exclusivity is "necessary" to promote competition or diversity or that the purported benefits of the ban outweigh the burdens it entails.

Therefore, the Commission should allow the exclusivity ban to sunset, rather than pursuing half measures that would fail to uphold the First Amendment interests at stake. The NPRM's alternatives to a full sunset—a market-by-market sunset that would require cable operators to show why the ban should be lifted, and a ban on exclusivity involving regional sports networks ("RSNs")—each present their own set of constitutional, statutory, and policy-

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[11] *Id.*

[12] *Id. See also id.*, Statement of Commissioner Ajit V. Pai at 1 ("Cable operators present a powerful argument that renewing the viewability mandate on the state of the current record would run afoul of the First Amendment."); Statement of Commissioner Mignon L. Clyburn at 1 (explaining that sunsetting the former viewability rule is "consistent with the First Amendment").

related problems. Only a full sunset would be consistent with the Commission's obligation to review the exclusivity ban under the First Amendment and Section 628(c)(5).

BACKGROUND

Congress enacted the exclusivity ban as one of the program access provisions of the 1992 Cable Act.[13] As the NPRM acknowledges, the exclusivity ban grew out of Congress's concern at the time that cable operators had "bottleneck" control in the market for video programming distribution, and that "vertically integrated cable programmers . . . may simply refuse to sell to potential competitors" of their cable operator affiliates.[14] Congress believed such refusals could suppress the emergence of new video programming distributors that might threaten the "monopoly" supposedly enjoyed by cable systems serving local communities.[15]

Two years later, in its *First Annual Report*, the FCC made a number of findings regarding horizontal concentration and vertical integration in the video distribution marketplace. On the issue of horizontal concentration, the FCC found that "[m]ost local markets for the distribution of multichannel video programming are highly concentrated, and for most consumers, cable television is the only provider of multichannel video programming."[16] At the time, cable

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13 *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 628(c)(2)(D), 106 Stat. 1460, 1496 (1992).

14 S. Rep. No. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1152, 1159 ("Senate Report"); *see also* NPRM ¶ 6 ("Congress was concerned that . . . increased horizontal concentration of cable operators and extensive vertical integration created an imbalance of power.").

15 Senate Report at 1141.

16 *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442 ¶ 201 (1994) ("*First Annual Report*").

operators served more than 95 percent of all multichannel video subscribers,[17] and the FCC believed that "trends" towards further consolidation would only "enhance[]" the "dominance of cable television in local markets."[18] Likewise, on the issue of vertical integration, the FCC found that "approximately 53% of programming services [were] integrated with cable system operators . . . , compared with 50% of programming services that were vertically integrated in 1990."[19] Moreover, in 1994, "[t]welve of the top fifteen most-watched services, according to prime-time rankings, [were] vertically integrated, an increase from ten in 1990."[20]

In the nearly two decades since, these apparent "trends" have entirely reversed. As the NPRM recognizes, horizontal concentration and vertical integration levels have been in rapid decline since the early 1990s. Satellite and telco rivals have grown into major competitors to cable and have seen sharp increases in subscriber levels.[21] In fact, DIRECTV and DISH, which are not subject to the program access rules, are now the nation's second and third largest MVPDs.[22] On the telco side, the Department of Justice ("DOJ") has found that "[t]he most significant development" regarding multichannel video programming distribution in recent years has been the launch of facilities-based services "by the principal local telephone companies,"

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17 *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124 ¶ 20 (2002) ("*2002 Extension Order*").

18 *First Annual Report* ¶ 202.

19 *Id.* ¶ 161.

20 *Id.* ¶ 162; *see also id.* (noting also that, in 1994, "[c]able operators ha[d] interests in fifteen of the top twenty-five services, an increase from thirteen in 1990").

21 *See* NPRM, App. A.

22 *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 ¶¶ 76, 78 (2009) ("*13th MVPD Competition Report*"); *see also* NCTA, *Top 25 Multichannel Video Programming Distributors as of Dec. 2011*, http://www.ncta.com/Stats/TopMSOs.aspx.

further noting that, "[w]here incumbent local exchange carriers ('ILECs') have entered, they have often achieved considerable success."[23] In the meantime, cable's share among multichannel video distributors has fallen steadily—to 78 percent by 2002,[24] to 58 percent by 2007, and to 50 percent today.[25] These developments led the D.C. Circuit to conclude three years ago (based on less extensive competition than exists today) that "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992."[26]

While these figures regarding competition among MVPDs are compelling, they significantly *understate* the robustness of competition in the industry, as they fail to account for the transformative arrival of online video distributors ("OVDs"). As of the third quarter of 2011, more than 146 million Americans—nearly half the entire population—watch video programming on the Internet.[27] In 2009 alone, the number of videos viewed online nearly doubled.[28] Moreover, 75 percent of American households now have a broadband connection capable of streaming online video.[29] The number of viewers reachable by Internet distribution thus far exceeds the number of viewers who subscribe to any single MVPD service. In light of these

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23 U.S. Department of Justice, *Voice, Video And Broadband: The Changing Competitive Landscape And Its Impact On Consumers*, at 6 (Nov. 2008), *available at* http://www.usdoj.gov/atr/public/reports/239284.pdf.

24 *See* NPRM, App. A.

25 *Viewability Sunset Order* ¶ 13.

26 *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

27 Nielsen Company, *State of the Media: The Cross Platform Report, Quarter 3, 2011*, at 6 (2012) ("Nielsen Report"), *available at* http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2012-Reports/Nielsen-Cross-Platform-Report-Q3-2011.pdf.

28 *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order*, 26 FCC Rcd 4238 ¶ 65 (2011).

29 *See* Nielsen Report at 2, 6.

developments, the DOJ found in 2011 that "a growing number of MVPD customers are . . . 'cutting the cable cord' completely in favor of OVDs," and that "[e]volving consumer demand" and "improving technology" mean that "OVDs are likely to continue to develop into better substitutes for MVPD video services."[30] These findings were borne out by a January 2012 survey showing that "9 percent of people have already cut the cord and 11 percent are considering doing so because they can watch almost all of their favorite shows online."[31] The competitive influence of OVDs thus should figure prominently in the Commission's consideration of whether to extend the exclusivity ban.[32]

At the same time, the percentage of satellite-delivered, national programming networks affiliated with cable operators has also experienced a precipitous drop—from 53 percent in 1994 to 35 percent by 2002, 22 percent by 2007, and 14 percent today.[33] Excluding Comcast-controlled networks—which would be subject to program access requirements regardless of the action taken by the Commission in this proceeding and should thus be ignored in this analysis—only 11 percent of satellite-delivered, national programming networks are cable-affiliated

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30 U.S. Dep't of Justice, Competitive Impact Statement, *United States v. Comcast Corp.*, No. 1:11-cv-00106, at 18 (D.D.C. Jan. 18, 2011), *available at* http://www.justice.gov/atr/cases/f266100/266158.htm.

31 Press Release, Deloitte, Accessibility Driving Demand for Content According to Deloitte's "State of the Media Democracy" Survey (Jan. 4, 2012), *available at* http://www.deloitte.com/view/en_US/us/press/Press-Releases/3ef5d7108de84310VgnVCM1000001a56f00aRCRD.htm.

32 *See* NPRM ¶ 25 (seeking comment on "the extent to which we should consider online distributors of video programming in our analysis").

33 *See* NPRM, App. B.

today.[34] And among today's 20 most-watched networks, only five are affiliated with a cable operator other than Comcast.[35]

While vertical integration between cable operators and video programmers has declined, the emergence of new technologies has given rise to other forms of vertical integration. For instance, the arrival of Internet video distribution has enabled video programmers to become their own distributors. The most prominent example of this phenomenon is Hulu, a joint venture among NBC, Fox, and ABC/Disney, which offers on-demand, streaming video of popular broadcast television programs to anyone with an Internet connection.[36] Such distribution arrangements are, of course, entirely unregulated by the Commission. Relatedly, non-cable distributors, unencumbered by any type of exclusivity ban, routinely enter into exclusive arrangements to distribute highly desirable video programming. DIRECTV has long been the exclusive distributor of NFL Sunday Ticket,[37] while the online distributor Netflix has secured exclusive rights to distribute new episodes of *Arrested Development* and other popular shows.[38]

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34 *Id.*

35 *Id.*

36 *See* THOMAS W. HAZLETT, IF A TV STATION BROADCASTS IN THE FOREST: AN ESSAY ON 21ST CENTURY VIDEO DISTRIBUTION at 4 (May 19, 2011), *available at* http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/30021.pdf ("[Y]et another revolution is now underway. Linear network TV line-ups – broadcast or cable – are being challenged by "over the top" video delivered via the Internet. Comcast, Time Warner Cable, Verizon, AT&T or DirecTV now compete with Hulu, Netflix, Apple TV and Google TV as they do with broadcast station owner Disney.").

37 *See* Aaron Kuriloff, *NFL, DirecTV Extend Sunday Ticket Package Through 2014 Season*, BLOOMBERG, Mar. 24, 2009, *available at* http://www.bloomberg.com/apps/news?pid=21070001&sid=aJD.ZwUAPmDo (reporting that "DirecTV Group Inc., the biggest U.S. satellite-television provider, will pay $1 billion a year starting in 2011 to retain exclusive rights to the NFL games").

38 *See, e.g.*, Catharine Smith, *Netflix Gets Exclusive "Arrested Development" Streaming Rights For New Season*, HUFFINGTON POST, Nov. 19, 2011, *available at* http://www.huffingtonpost.com/2011/11/18/netflix-arrested-

The Commission's continued focus on one form of vertical integration and on one form of exclusivity—that is, integration and exclusivity involving a cable operator and satellite-delivered cable programmer—therefore is entirely anachronistic.

DISCUSSION

I. THE COMMISSION SHOULD ALLOW THE EXCLUSIVITY BAN TO SUNSET

The *per se* prohibition on exclusive contracts between cable operators and their affiliated, satellite-delivered programmers is an outmoded relic, premised on an early-1990s view of video programming distribution and ill-suited to today's dramatically changed and vibrantly competitive marketplace. The rule thus should be allowed to sunset, both because it is no longer "necessary" to promote competition and diversity and because it represents an impermissible intrusion on protected speech under the First Amendment.

A. The Commission Would Bear a Heavy Burden in Justifying Another Extension

The standard of review in this proceeding weighs heavily against retaining the exclusivity ban. Under Section 628(c)(5), which establishes a default rule of no regulation absent Commission action, the Commission bears the burden of demonstrating that the ban remains "necessary to preserve and protect competition and diversity in the distribution of video programming."[39] In addition, because the ban implicates the speech rights of cable operators and their affiliated programmers,[40] the Commission also bears the substantial constitutional

development_n_1102443.html; Eric Kain, *Could the New Netflix Exclusive Series 'Lilyhammer' Give New Life to Online Television?*, FORBES, Jan. 3, 2012, *available at* http://www.forbes.com/sites/erikkain/2012/01/03/could-the-new-netflix-exclusive-series-lilyhammer-breath-new-life-into-online-television.

39 47 U.S.C. § 548(c)(5).

40 *See Time Warner*, 93 F.3d at 966 (explaining, in reviewing the program access rules, that "'there can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the

obligation to justify the exclusivity ban under the First Amendment, taking into account current marketplace conditions.[41]

The Commission's duty to re-justify the ban in light of today's competitive environment is clear. In *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, the Supreme Court explained that constitutional burdens "must be justified by current needs," and that where "there is considerable evidence" that a decades-old statute "fails to account for current … conditions," a court must "not shrink from [its] duty 'as a bulwar[k] of a limited constitution against legislative encroachments.'"[42] Accordingly, the D.C. Circuit has required the Commission to account for changed marketplace circumstances when re-justifying rules that implicate the First Amendment rights of cable operators and other speakers. For instance, in its 2009 *Comcast* decision, the court vacated the Commission's cable ownership cap "[i]n light of the changed marketplace" because retaining it "would continue to burden speech protected by the First Amendment."[43] The court similarly rejected the Commission's retention of the personal attack and political editorial rules in 1999 "to the extent that it relies on a thirty-year-old conclusion that the challenged rules survive First Amendment scrutiny."[44] As noted above, the Commission

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speech and press provisions of the First Amendment'") (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994)).

41 Notably, in affirming the *2007 Extension Order*, a divided panel of the D.C. Circuit determined that the petitioner had not properly brought a First Amendment challenge to the exclusivity ban and thus did not consider those arguments on appeal. *See Cablevision I*, 597 F.3d at 1311-12.

42 *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2512, 2513 (2009) (quoting The Federalist No. 78, p. 526 (J. Cooke ed. 1961) (A. Hamilton)).

43 *Comcast*, 579 F.3d at 9-10.

44 *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 882 (D.C. Cir. 1999).

recently recognized this constitutional obligation in sunsetting the dual carriage requirements it adopted pursuant to Section 614(b)(7).[45]

The Commission thus cannot rely on decades-old justifications for retaining the exclusivity ban, and must instead undertake a fresh examination of the rule's constitutionality. As the D.C. Circuit has explained, any extension of the exclusivity ban must satisfy *at least* intermediate scrutiny, which requires the Commission to demonstrate that the ban (i) "furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression," and (ii) "is no greater than is essential to the furtherance of that interest."[46] If the Commission cannot affirmatively justify the exclusivity ban under intermediate scrutiny—and as discussed below it cannot—then it must allow the ban to sunset.

B. The Exclusivity Ban Can No Longer Be Justified in Today's Marketplace

The NPRM appropriately asks whether, "[g]iven the current state of competition in the video programming market and the video distribution market, . . . the First Amendment require[s] the exclusive contract prohibition as it exists to today to be sunset."[47] The answer is a resounding yes.

As an initial matter, the exclusivity ban is not furthering any important governmental interest. When Congress enacted the exclusivity ban in 1992, it did so in order to "encourage competition to cable,"[48] and it expressly required the Commission to allow the ban to sunset once

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45 *See Viewability Sunset Order* ¶ 11.

46 *Time Warner*, 93 F.3d at 966 (quoting *Turner I*, 512 U.S. at 662).

47 NPRM ¶ 86.

48 Senate Report at 1161.

it was no longer "necessary" to advance that interest.[49] Although it is unclear whether the exclusivity ban ever truly advanced the government's asserted interest in promoting competition among video distributors, it is plainly not doing so today. As discussed above, the video distribution marketplace has never been so competitive and diverse, and the disappearance of cable's supposed "bottleneck" undercuts the asserted governmental interests at stake.[50]

Indeed, far from "furthering" any interest in competition and diversity among video programming distributors, the exclusivity ban is thwarting competition by reducing cable operators' incentive to invest in new and existing programming. The freedom to choose when to sell and when not to sell is a key ingredient of a competitive marketplace, and compelling firms "to share the source of their advantage . . . lessen[s] the incentive . . . to invest in those economically beneficial facilities."[51] In the context of cable programming, it often makes business sense for a cable-affiliated programmer to choose the broadest distribution possible; for example, TWC has announced its intention to distribute its two Lakers regional sports networks ("RSNs") "to all satellite, cable and telco distributors in the Lakers' territory."[52] But in some

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49 47 U.S.C. § 548(c)(5) (providing that the ban must be allowed to sunset if it is no longer "necessary to preserve and protect competition and diversity in the distribution of video programming").

50 *See Comcast*, 579 F.3d at 8-10.

51 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004).

52 Press Release, Time Warner Cable and the Los Angeles Lakers Sign Long-Term Agreement for Lakers Games, Beginning With 2012-2013 Season (Feb. 14, 2011), *available at* http://ir.timewarnercable.com/phoenix.zhtml?c=207717&p=irol-newsArticle&ID=1528805&highlight.

cases, exclusivity will be an important point of competitive differentiation and will spur other distributors to invest in their own networks.[53]

Congress, courts, and this Commission have all recognized the benefits of program exclusivity in a competitive video distribution marketplace. Indeed, Congress enacted the sunset provision precisely because it recognized that "exclusivity can be a legitimate business strategy where there is effective competition."[54] The D.C. Circuit has likewise explained that, "by building a sunset provision into the exclusive contract prohibition, . . . Congress sought to balance the need for regulatory intervention in markets possessing significant barriers to competition with its recognition that vertical integration and exclusive dealing arrangements are not always pernicious and, depending on market conditions, may actually be procompetitive."[55] And the Commission has repeatedly acknowledged that its exclusivity ban "result[s] in certain costs, such as unnecessarily restricting procompetitive arrangements that in certain instances may foster competition in the video distribution market and promote competition and diversity in the video programming market."[56]

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53 *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 51 n.200 (2010) ("*2010 Program Access Order*") (explaining that "exclusivity plays an important role in the growth and viability of local cable news networks" and that "permitting such exclusivity should not dissuade new MVPDs from developing their own competing regional programming services") (internal quotation marks, citations, and alterations omitted).

54 Senate Report at 1161.

55 *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 721 (D.C. Cir. 2011) ("*Cablevision II*").

56 NPRM ¶ 88; *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd 17791 ¶ 63 (2007) ("*2007 Extension Order*") ("We recognize the benefits of exclusive contracts and vertical integration cited by some cable MSOs, such as encouraging innovation and investment in programming and allowing for 'product differentiation' among distributors.").

In this regard, the video programming distribution marketplace is not unlike the newspaper industry. Like newspapers, cable operators often rely on a mix of self-generated and third-party content to entertain and inform their subscribers. As the Seventh Circuit observed when evaluating exclusivity arrangements in the newspaper industry, "[a] market in which every newspaper carrier the same stories, columns, and cartoons would be a less vigorous market than the existing one. And a market in which the creators of intellectual property (such as the New York Times) could not decide how best to market it for maximum profit would be a market with less (or less interesting) intellectual property created in the first place."[57] As explained above, the same is unquestionably true in the market for the distribution of video programming. The exclusivity ban therefore impedes, rather than furthers, any asserted interest in promoting competition and diversity among video distributors. Congress determined that, based on the monopoly conditions it identified in 1992, the interest in promoting product differentiation had to yield to the need to give new entrants access to vertically integrated programming. Today, however, that bottleneck rationale has evaporated.[58]

Moreover, a blanket ban on exclusive contracts is far more restrictive than necessary to advance those asserted interests. The rule inappropriately *presumes* that exclusive contracts would cause competitive harm, rather than requiring complainants or the Commission to demonstrate such harm before infringing on the speech of cable operators and their affiliated programmers. A number of less restrictive alternatives for addressing potentially harmful exclusivity arrangements are available under Section 628 that would appropriately place the burden on complainants. As the NPRM acknowledges, "[e]ven if the exclusive contract prohibition were allowed to sunset (wholly or partially), an MVPD would still have the option to

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57 *Paddock Publications, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996).

58 *See supra* at 6-8.

file a complaint with the Commission" alleging that such a contract constitutes an "unfair act" under Section 628(b),[59] or "discrimination" under Section 628(c).[60]

In all events, the Commission cannot possibly justify an exclusivity ban that applies *only* to cable operators, where satellite providers now serve 34 percent of all MVPD subscribers, telco providers are rapidly gaining market share, and Internet-based distributors play a significant role in the broader video distribution marketplace. The exclusivity ban's inherent bias against cable operators raises significant constitutional (and administrative law) concerns. It is a bedrock principle of First Amendment law that, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another."[61] Yet the exclusivity ban does precisely that, by intruding on the speech decisions of cable operators and their affiliated programmers while allowing similarly situated speakers to enter exclusivity arrangements as they please. Indeed, the rule's anti-cable bias in today's competitive marketplace betrays the "overall irrationality of the Government's regulatory scheme"[62]—which provides yet another basis for allowing the rule to sunset.[63] As TWC has explained in a related proceeding, the

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59 NPRM ¶ 48.

60 *Id.* ¶ 58. TWC believes that such provisions also have outlived their purpose and their constitutional justification, but they are not subject to the statutory sunset provision, unlike the exclusive contract ban.

61 *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also Turner I*, 512 U.S. at 659 ("Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns."); *Leathers v. Medlock*, 499 U.S. 439, 448 (1991) (holding that regulations that discriminate among speakers threaten to "distort the market for ideas").

62 *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (finding a regulation permitting brewers "to disclose alcohol content in advertisements, but not on labels," could not "directly and materially advance its asserted interest because of the overall irrationality of the Government's regulatory scheme").

63 *See also Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193 (1999) (holding that "to the extent that the purpose and operation of federal law distinguishes

Commission should be pursuing regulatory parity among all types of distributors (including OVDs) in the robustly competitive video distribution marketplace, including by eliminating outdated regulatory regimes that target only cable operators and by working with Congress to develop a unified framework for all video distributors.[64]

II. THE ALTERNATIVE PROPOSALS TO "RELAX" THE EXCLUSIVITY BAN DO NOT ALLAY THESE FIRST AMENDMENT CONCERNS

A. A Market-by-Market Sunset Would Impermissibly Shift the Commission's Burden to Cable Operators

As an alternative to sunsetting the exclusivity ban, the NPRM suggests the possibility of a phased "market by market" approach, under which a cable operator would be required to file a "Petition for Sunset seeking to remove the exclusive contract prohibition on a market-by-market basis based on the extent of competition in the market."[65] Although the NPRM professes some ambivalence as to "[w]ho should bear the burdens of production and persuasion" under this approach,[66] the proposed rule appearing in the Appendix would place the burden on the petitioner to provide "reasons to support a finding that such prohibition is not necessary to preserve and protect competition and diversity in the distribution of video programming in the geographic area specified."[67]

This proposal cannot be squared with either the First Amendment or Section 628(c)(5) of the Act, and thus should be rejected by the Commission. Indeed, requiring cable operators to

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among information about tribal, governmental, and private casinos based on the identity of their owners or operators, the Government presents no sound reason why such lines bear any meaningful relationship to the particular interest asserted: minimizing casino gambling and its social costs by way of a (partial) broadcast ban").

64 *See generally* Comments of Time Warner Cable Inc., MB Docket No. 12-83 (filed May 14, 2012).

65 NPRM ¶ 69.

66 *Id.* ¶ 70.

67 *Id.*, App. D, § III.

prove that the exclusivity ban is unnecessary in a given market would turn the applicable constitutional and statutory burdens on their heads. It is axiomatic that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."[68] Likewise, Section 628(c)(5) imposes a burden on the *Commission* to demonstrate why the ban remains necessary[69]—not a burden on *cable operators* to show why the ban has become unnecessary. But the NPRM's market-by-market approach would shift that burden to cable operators, thus effectively creating a presumption that the exclusivity ban is a valid infringement on speech and forcing cable operators to prove otherwise. Such a framework is anathema to the First Amendment and Section 628(c)(5).

A market-by-market sunset framework would also be tremendously burdensome and inefficient. If the process for seeking "effective competition" determinations is any guide, a Commission proceeding on a so-called "Petition for Sunset" could take years—thus preventing cable operators facing robust competition in local areas from entering into procompetitive exclusivity arrangements. If anything, petitions to sunset the exclusivity ban would be more complex and would consume more time and resources than effective competition proceedings, which look only to whether competing MVPDs meet certain bright-line subscribership thresholds in local markets,[70] and do not turn on holistic (and vague) assessments of "diversity."[71] Market-by-market exclusivity also would be unworkable from a business

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68 *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

69 47 U.S.C. § 548(c)(5) (providing that the exclusivity ban "shall" sunset "unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.").

70 *See* 47 C.F.R. § 76.905(b) (setting forth the standard for "effective competition" determinations).

71 *See* NPRM, App. D, § III.

standpoint. Cable operators and their affiliated programmers generally find it most efficient to negotiate programming agreements that cover the cable operator's entire footprint; by contrast, if a cable operator were permitted to offer exclusivity in some geographic areas but not in others, it would face the daunting and unwieldy task of negotiating separate agreements for each local area. A market-by-market sunset thus would make as little sense from a policy perspective as it would as a legal matter.

B. Preserving the Ban for Exclusive Arrangements Involving RSNs Would Run Afoul of the First Amendment

The NPRM also seeks comment on another alternative to a complete sunset: "retain[ing] the exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs."[72] But the Commission cannot save its otherwise unconstitutional exclusivity ban simply by narrowing it to RSNs. To the contrary, as the Commission has previously recognized, distinguishing between different types of satellite-delivered, cable-affiliated programming "would place the Commission in the untenable position of designating certain programming as more essential than others and thus raise constitutional questions."[73] Indeed, such a starkly content-based exclusivity restriction would undoubtedly be subject to strict scrutiny and would not come close to satisfying that extremely exacting standard. Moreover, regardless of the level of scrutiny applied, a ban on RSN exclusivity (like the existing ban) would impermissibly assume the existence of market power and anticompetitive effects in a competitive marketplace, and also relieve the Commission of its obligation to justify infringements on speech in particular cases.[74] And even if a narrower

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72 *Id.* ¶ 72.

73 *2002 Extension Order* ¶ 69; *see also 2007 Extension Order* ¶ 69 ("[A]ny attempt to distinguish between different types of cable-affiliated programming is likely to raise Constitutional concerns.").

74 *See supra* note 68 and accompanying text.

exclusivity ban that distinguishes between RSNs and all other forms of programming were constitutional, the Commission would not be authorized to adopt it pursuant to Section 628(c)(2)(D), which applies the ban to *all* satellite-delivered, cable-affiliated programming services.[75]

Contrary to the suggestion in the NPRM,[76] the D.C. Circuit's 2011 *Cablevision* decision undercuts, rather than supports, the notion that a selective ban on RSN exclusivity would survive First Amendment scrutiny. There, the D.C. Circuit was reviewing the Commission's decision to adopt a *presumption* regarding RSN programming, not an outright ban. In light of empirical evidence that "withholding of an RSN in one case did not have an impact on competition,"[77] the Commission had expressly declined to ban all exclusive contracts involving terrestrially delivered, cable-affiliated RSNs. Instead, the Commission adopted a "case-by-case approach" with a "rebuttable presumption that an 'unfair act' involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b)."[78] In reviewing the *2010 Program Access Order*, the D.C. Circuit upheld the Commission's case-by-case approach to exclusive contracts involving terrestrially delivered RSNs, concluding that "the Commission's presumptions represent a narrowly tailored effort" to further its asserted interest in competition.[79] As the court explained, the Commission's decision to "substantially narrow[] the scope of its regulations by focusing on the effect of terrestrial withholding in individual cases" is "one reason

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75 *See* 47 U.S.C. § 548(c)(2)(D).

76 *See* NPRM ¶ 77.

77 *Id.* ¶ 73 (citing *2010 Program Access Order* ¶¶ 35, 52).

78 *Id.*

79 *Cablevision II*, 649 F.3d at 718.

why its rules survive First Amendment scrutiny."[80] By contrast, a prophylactic prohibition on RSN exclusivity would be the *opposite* of the case-by-case approach endorsed by the D.C. Circuit. The D.C. Circuit's limited approval of a case-by-case approach does not support the proposition that an outright ban on *all* exclusive arrangements involving satellite-delivered, cable-affiliated RSNs would survive First Amendment scrutiny, particularly in light of the further advances in competition that have occurred since that decision.

To the extent the Commission determines that further regulation of RSN programming is warranted at all, it should base any new rules on the "must have" characteristics of major sports programming as a general matter, rather than singling out programming affiliated with cable operators.[81] If market forces are insufficient to ensure consumer access to such programming, the problem is not vertical integration, but rather the nature of the programming itself and the negotiating leverage it can confer.[82] Indeed, it would be irrational (and thus arbitrary and capricious) to focus solely on cable-owned RSNs when the major programming conglomerates use their control of sports programming rights to extract unreasonable rates from cable subscribers.[83]

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80 *Id.* at 722.

81 *See* Reply Comments of Time Warner Cable Inc., MB Docket No. 11-128, at 9-12 (filed Sept. 26, 2011).

82 *See 2010 Program Access Order* ¶ 34 ("The salient point for purposes of Section 628(b) is not the total number of programming networks available or the percentage of these networks that are vertically integrated with cable operators, but rather the popularity of the particular programming that is withheld . . . .").

83 *See, e.g.*, *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶ 15 (2011) (describing retransmission consent dispute that prevented millions of consumers in the New York area from watching two World Series games and a number of NFL regular season games); David D. Kirkpatrick, *Murdoch's First Step: Make the Sports Fan Pay*, N.Y. TIMES (Apr. 14, 2003), at C1 ("Mr. Murdoch has long described sports programming as

CONCLUSION

For the foregoing reasons, the Commission should reject proposals to retain or simply "relax" the exclusivity ban, and instead allow the ban to sunset completely as scheduled. Failure to do so would not only contravene the standard set forth in Section 628(c)(5), but would also run afoul of the First Amendment.

Respectfully submitted,

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June 22, 2012

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his 'battering ram' to attack pay television industries around the world, using a portfolio of exclusive broadcasts to demand high programming fees….").